***United States Court of Appeals***

***for the Second Circuit***

# BRIEF FOR APPELLEE

# 77-1256

*To be argued by*
DAVID C. PATTERSON

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 77-1256**

B
P/S

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

RAMON AMPARO, a/k/a "RAYMOND GOMEZ",
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the Southern District of New York,*
*Attorney for the United States of America*

DAVID C. PATTERSON,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,*
*Of Counsel.*

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 77-1256**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

RAMON AMPARO, a/k/a "Raymond Gomez",

*Defendant-Appellant.*

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Ramon Amparo, a/k/a "Raymond Gomez," appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on May 16, 1977, after a one week trial before the Honorable Charles E. Stewart, Jr., and a jury.

Indictment 76 Cr. 1016, filed in one count on November 8, 1976, charged Amparo with the payment of a bribe to an employee of the Social Security Administration in connection with the issuance of Social Security cards to illegal aliens. Trial before a jury and the Hon. Charles E. Stewart began on February 24, 1977, and ended with a mistrial on March 4, 1977, the jury being unable to reach a verdict. On March 9, 1977, superseding indictment S. 76 Cr. 1016 was filed, charging Amparo with one count of bribery identical to the single count of the previous indictment, and additionally with one count of

paying an unlawful gratuity. Trial before Judge Stewart and a second jury began on March 14, 1977, and ended on March 24, 1977, with Amparo's conviction on the bribery charge. On May 16, 1977, Amparo received a suspended Youth Corrections Act sentence, with three years' probation.

## Statement of Facts

### A. The Government's Case

The Government's principal witness was the object of Amparo's bribery attempts, Mrs. Dorothea Sanchez. At the time of these attempts, Mrs. Sanchez was employed as an "Account Number Clerk" in the Social Security office at 55 West 125th St. in Manhattan. It was one of her duties in that position to review and approve applications for Social Security cards, and in particular to require documentary proof (*e.g.*, birth certificate, passport, or visa) that the applicant was either a citizen of the United States, or an alien entitled to work here. If such proof was presented, and the application was otherwise in order, Sanchez approved the application and forwarded it to the Social Security Administration's Bureau of Data Processing in Baltimore, from which a Social Security card was sent directly to the applicant at the address given on the application. (Tr. 21-29, 60-65).*

The gist of Amparo's bribery scheme was to pay Sanchez to process applications without the necessary proof of citizenship, and by this means to obtain Social Security cards for a number of illegal aliens with whom he was in contact.

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* References prefixed "Tr." are to the transcript of Amparo's second trial, beginning on March 14, 1977. References prefixed "GX" are to Government's Exhibits at the same trial.

Sanchez testified that the first time she remembered speaking with Amparo was in February or March of 1976. He introduced himself to her first by telephone and then in person during a visit to her office.* During this visit, he told her he wanted to discuss something that could not be discussed at the office or over the office telephone. She gave him her home telephone and address. (Tr. 65-71, 90-94).

After several telephone calls to Sanchez's home, Amparo visited her there and made the following proposition: he knew a number of illegal aliens who needed Social Security cards in order to work in the United States; he would pay Sanchez twenty-five dollars for each Social Security card application in the name of one of these aliens that she would process without the usual proof of citizenship or work status, which proof would, of course, not exist. Amparo told her she could make seventy-five to a hundred dollars a week processing the applications. He also mentioned during this conversation that there were other people in Social Security and Welfare offices who were doing the same thing for him. Hearing this, Sanchez decided to pretend to go along, in the hope of learning more about Amparo's activities. She said she would think about his offer. (Tr. 92-102).

Sanchez reported the incident to Charles Brown, the Assistant Manager of the 125th St. office, who told her to "see what develops on it." (Tr. 102-04). On or about May 25, 1976, Amparo brought Sanchez three Social Security card applications for her to process. (GX 5-7, Tr. 104-08). These applications, like all of the seventeen applications that Amparo gave or intended to give to Sanchez over the next four months, were in the names of third persons with foreign places of birth. (GX 5-7,

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* In his dealings with Sanchez, Amparo used the last name "Gomez." (Tr. 118).

11, 12, 19-25, 31, 32, 36-38). There was never any documentary proof of the citizenship or alien status of the "applicants"; indeed, in all but one case, the Government proved on the basis of the names and dates and places of birth of the "applicants" that they were either in the United States illegally, having outstayed their visas, or were without any record at all at the Immigration and Naturalization Service. (Tr. 520-38). Another incriminating characteristic of the applications was that, in all cases except three, they showed as the address of the "applicant" either Amparo's own address or that of his sister. (Tr. 448-49).

Sanchez again reported to Brown, who completed a written report of the incident and took custody of the three applications. These, like all subsequent applications, were introduced into evidence at trial. (Tr. 105-07; GX 5-8).

Amparo subsequently made good on his offer of money. When Sanchez left the Social Security office on Friday, June 18, 1976, she found Amparo waiting for her in his car outside. He insisted on giving her a ride home, and during that ride gave her a twenty-dollar bill, saying that she had "earned" it, or words to that effect. Sanchez testified that she carefully kept this bill separate from her own money, and that she gave it to Brown at the first opportunity.*

At this point, the F.B.I. was called into the case. Special Agents interviewed Sanchez on July 2, 1976 (Tr. 119, 416), and either supervised or were made aware of every subsequent contact between Amparo and Sanchez. The principal meetings were the following:

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* The bill was introduced at trial, the parties having stipulated to its chain of custody from the time of Brown's receiving it. (Tr. 110-12, 116-17; GX 10).

(1) On July 8, 1976, Amparo arranged to meet with Sanchez in the lobby of the Social Security office. The meeting was surveilled by Special Agent William Lynch, who saw Amparo hand Sanchez a bundle of papers. After the meeting, Sanchez gave the papers to Lynch, who found that they included two additional Social Security card applications. (Tr. 119-125, 417-422; GX 11, 12).

(2) On August 2, 1976, Amparo again arranged to meet with Sanchez in the lobby, for the purpose of giving her additional applications. Once again, a Special Agent of the F.B.I., Sheila Horan, was present. Sanchez also wore a tape recorder to record the conversation between herself and Amparo. At this meeting, Amparo gave Sanchez an envelope containing seven additional applications and a second twenty dollar bill. The envelope and its contents were turned over to Special Agent Lynch immediately after the meeting.*

(3) On August 6, 1976, Sanchez and Amparo met again. Amparo presented two more applications for processing. The conversation was again recorded, and the recording, played at trial, again contained statements by Amparo confirming the payment and promise of the bribes. (Tr. 159-67, 440-44; GX 28, 31, 32, 35).

Apart from an unplanned encounter between Sanchez and Amparo in the Social Security office on August 23, 1976 (Tr. 169-78), the August 6 meeting was their last. On September 10, 1976, Amparo called and arranged to

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* Sanchez testified to what was in the envelope, as did Agent Lynch. (Tr. 132-39, 424-29; GX 18-25). The presence of the twenty dollar bill in the envelope was also confirmed by the tape recorded conversation between Amparo and Sanchez. This conversation, which was played at trial, included discussion of the bill simultaneously with its being received by Sanchez. It also included statements by Amparo confirming the illegal purpose of the payment. (Tr. 140-41, 150; GX 26, 27).

meet with Sanchez for the purpose of giving her additional applications. Instead of Sanchez, he found the F.B.I. waiting for him in the lobby. He was arrested and found to be in possession of three more Social Security card applications. (Tr. 178-181, 445-47; GX 36-38).*

## B. The Defense Case

The defense called five witnesses. Dena Kohn, a Spanish-English interpreter, testified to Amparo's limited comprehension of English, the language used in the taped conversations. (Tr. 634-38, 646-48). Richard Schoen, also a Spanish-English interpreter, testified that normally such conversations with Spanish-speaking defendants were carried out in Spanish. (Tr. 630-32). Myreia Concepcion and Nancy Amparo, the defendant's mother and sister-in-law, testified that during the period from March to August of 1976, a "Miss Sanchez" had called Amparo at his home a number of times. However, this "Miss Sanchez" was never otherwise identified, or shown to be the same Sanchez as the Government's witness. (Tr. 620-30). The defense also called Michael Caviano, who testified that from May to July of 1976, he had been Dorothea San-

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* In view of the jury verdict, the Court must consider the evidence in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). *See also United States* v. *Riviolo*, 554 F.2d 550 (2d Cir. 1977); *United States* v. *Hawley*, 554 F.2d 50, 52 (2d Cir. 1977), and cases cited. For this reason the Government's statement of facts does not include detailed refutations of the several assertions in the appellant's statement of facts that are either in error or reflect a reading of the evidence most favorable to him. It should be made clear, however, that the Government disputes, now as it did at trial, the appellant's claims (1) that there was any credible evidence of Amparo's having been in contact with Sanchez earlier than she testified to (Brief for Appellant at 4, 7-8) and (2) that Sanchez failed to report the bribe offers promptly and to proper authorities. (Brief at 5-6).

chez's supervisor at the Social Security Administration, and that she had never reported the Amparo matter to him. (Tr. 571). In cross-examination, however, he stated that his relationship with Sanchez was not good, and that an employee in her position was formally entitled to report—as she had—to Brown instead. (Tr. 592-79).

## C. 3500 Material

The defense was provided before trial with the Section 3500 material for all Government witnesses. This material included a number of F.B.I. reports containing the written statements of Sanchez and also of Agent Lynch. Other F.B.I. reports existed that were not turned over because they contained either no statements of a witness, or statements of a witness unrelated to his testimony. The omission of these reports from the 3500 material was reflected in the non-sequential numbering of the reports that were provided. Defense counsel noticed this during trial and requested that the omitted reports be submitted to the court *in camera* for its consideration of whether they constituted 3500 material. (Tr. 234). The reports were so submitted. Judge Stewart ruled that they were *not* 3500 material. (Tr. 267-68, 310-11). The reports were made a court exhibit and preserved for appeal. (Tr. 880-81).

## D. Summations of Counsel

The prosecutor's direct summation was devoted almost entirely to a review of the evidence against Amparo. (Tr. 725-39). Defense counsel, in his considerably more loquacious summation (Tr. 740-803), dwelt principally on Sanchez's credibility, which he argued had been undermined (among other things) by certain alleged inconsistencies between her testimony at trial and her prior statements, and by her refusal to admit to the full extent of her dealings with Amparo, with respect, for example,

to the telephone calls she allegedly made as "Miss Sanchez." Joined with this attack on Sanchez's testimony was an argument by defense counsel that Amparo's incriminating statements on the tapes were not to be taken at face value because of Amparo's lack of facility in English. He argued that if Sanchez were not to be believed, and the tape recordings were ambiguous, then a reasonable doubt was created as to the motive for the payments and the intent with which they were made. (Tr. 748, 760-61, 768-70). At no time did defense counsel suggest in any way that either of the two twenty dollar bills might in fact not have been passed to Sanchez as she and Lynch testified, and as the tapes confirmed.*

Defense counsel also reminded the jury of the importance of their decision to Amparo and of the Government's heavy burden of proof. In doing so he several times asserted that Amparo's liberty was at stake:

> There is a rule likewise when somebody's individual liberty is at stake that the entire burden of proving the case is on the Government and has to be proven beyond a reasonable doubt.

(Tr. 776)

> Isn't that what it comes down to, ladies and gentlemen? For Mr. Amparo it is more important than any of the things I've mentioned, more im-

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* Indeed the defense attorney as much as conceded that payments had been made when he stated:

> The question here is did Ramon Amparo bribe or pay an illegal gratuity to Mrs. Sanchez. That is the question. Not whether he was getting applications, not whether he knew illegal aliens or didn't know them, not whether he paid money or didn't pay money. His Honor will tell you the elements of all charges. There is further element in that the Government didn't want to tell you about. He has had to have done these things knowingly and wilfully. (Tr. 760).

portant than money, property, friends. It is his individual liberty.

I know most of you have had a background in civil cases. The rules are different there. We don't have an issue of individual liberty at stake in a civil trial and judges tell you they go by preponderance of evidence where you can weigh 57% and 43 and you can buy 57. It doesn't work that way here. This is something far more precious at stake here, ladies and gentlemen, individual liberty. That is why the rule is totally different. That is why the burden of proof is much higher.

(Tr. 799-800)

In his rebuttal summation (Tr. 812-28), the prosecutor argued that Sanchez's credibility had not been called into serious question, and that there was ample evidence of Amparo's guilt even if Sanchez's testimony were disbelieved. In this vein, the following interchange took place:

MR. PATTERSON: . . . there is plenty of evidence, quite apart from Mrs. Sanchez, although, as I say, there has been no real doubt cast on her testimony. The question is did the defendant give Mrs. Sanchez money with the intent to influence her in getting the forms and knowing that he was doing something wrong, had a generally bad motive. As for giving her money, it is not denied. How could it be.

MR. CHASE: I must protest. By his plea of not guilty the defendant has denied each and every element of the crime, as your Honor has instructed.

THE COURT: You may go ahead.

MR. PATTERSON: There has been no evidence introduced by the defense to contradict the fact that the money was given.

(Tr. 821).

Shortly thereafter defense counsel requested a side bar, at which he repeated his objection to the prosecutor's "indicating that the defendant hadn't presented any evidence as to something." Judge Stewart responded that "I don't think there has been any impropriety, and if there has been any impropriety, I think my charge will take care of it." (Tr. 822). The charge is set out in the margin.*

During his rebuttal summation, the prosecutor also responded to defense counsel's suggestion that Amparo's liberty was at stake:

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* A defendant does not have to prove his innocence.

On the contrary, a defendant is presumed to be innocent of the accusations contained in the indictment and the Government must prove a defendant's guilt beyond a reasonable doubt. This presumption of innocence was in the defendant's favor when the trial began, it was present during the trial, it is present now as I charge you, and it remains in the defendant's favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied that the Government has sustained its burden of proving the guilt of the defendant beyond a reasonable doubt.

It is for this reason that a defendant does not need to take the witness stand and, in fact, the defendant in this case has not testified on his own behalf. The Constitution, the laws of the United States, provide that in any criminal matter a defendant is under no obligation to come forward to testify or indeed to produce any evidence—I repeat—the Constitution and the laws of the United States provide that in a criminal matter a defendant is under no obligation to come forward to testify or indeed to produce any evidence, and this is because the burden of proving a violation is solely and exclusively on the prosecution. So you are to draw no inference from the defendant's failure to testify and, in fact, you must not speculate upon it or consider it in any way in your deliberations. A defendant has the absolute right not to make any defense and to rely upon the Government's burden to prove his guilt beyond a reasonable doubt.

MR. PATTERSON: At the outset of this case you took an oath and under that oath you have a serious and solemn responsibility, a duty to decide this case of the defendant's guilt on all of the evidence. You have a duty to do without fear or favor, bias or prejudice to anyone, not on the basis of sympathy for the defendant, and, by the way, the subject of his punishment is no concern of yours. It is the concern of Judge Stewart who could give the maximum sentence and who could give probation and let the defendant——

MR. CHASE: Your Honor, I take most strong objection. Your Honor has stated this subject is entirely outside the consideration of the jury.

THE COURT: The question of punishment, as I told you at the outset, is for me. I will repeat this to you in my charge.*

(Tr. 826-27).

## ARGUMENT

### POINT I

### There Was No Violation Of 18 U.S.C. § 3500.

As noted above, the Government excised from the F.B.I. reports that were provided to the defense those reports that either did not contain statements of any Government witness, or contained statements of a Government witness that were not "relate[d] to the subject

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* The charge was as follows:

Under your oath as jurors, as I have told you, you cannot allow a consideration of the punishment which may be inflicted on a defendant if convicted to influence your verdict in any way or to enter into your deliberations. You must not be influenced by any assumption, conjecture or by sympathy or any inference not warranted by the facts. (Tr. 878).

matter as to which the witness [would] testif[y]." 18 U.S.C. § 3500(b). Following the procedure contemplated by the statute, § 3500(c), and favored by this Court, *United States* v. *Pacelli*, 491 F.2d 1108, 1118 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974), the Government turned the excised reports over to the District Court for its *in camera* determination of whether disclosure was required under § 3500(b). The District Court sustained the Government's determination in this regard. Amparo now asks this Court to examine the reports in question, and to review the District Court's determination.

The Government does not oppose this application. Nor has it opposed Amparo's request for permission to examine the sealed materials and to file a supplemental, sealed brief addressed to the question of the reports' producibility under § 3500. The Government will respond to such a brief when and if one is filed. Amparo's unsealed brief, however, warrants this generalized response:

Upon inspection, the materials will be found to be clearly outside the scope of § 3500(b). In the few cases where the excised reports contain statements of a Government witness, those statements do not relate to the subject matter of the witness's testimony.

Moreover, even if the question were close—which it is not—it would still be one for the District Court to resolve. Producibility under § 3500 is a matter "within the good sense and experience of the district judge . . . subject to the appropriately limited review of the appellate courts." *Palermo* v. *United States*, 360 U.S. 343, 353 (1959). The "appropriately limited review" of which the Supreme Court spoke in *Palermo* has been held to be a review only for abuse of discretion, *United States* v. *Augenblick*, 393 U.S. 348, 355 (1969); *United States* v. *Pacelli*, *supra*, at 1118, and for "clear error" in the factual finding of producibility *vel non*. *Campbell* v. *United States*, 373 U.S. 487, 493 (1963); *United States* v. *Sten*,

342 F.2d 491, 494 (2d Cir.), *cert. denied*, 382 U.S. 854 (1965); *United States* v. *Birnbaum*, 337 F.2d 490, 498 (2d Cir. 1964); *United States* v. *Cardillo*, 316 F.2d 606, 616 (2d Cir.), *cert. denied*, 375 U.S. 882 (1963).

Finally, even if a violation of § 3500 were found to have occurred, the error was certainly harmless. The excised material contained nothing of impeachment value; there was therefore nothing like a "significant chance that . . ., developed by skilled counsel . . ., [it] could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), and cases cited. *See also United States* v. *Hilton*, 521 F.2d 164, 166 (2d Cir. 1975), *cert. denied*, 425 U.S. 939 (1976).

## POINT II

### The Prosecutor in His Rebuttal Summation Committed No Error.

### A. Reversal is not required by the prosecutor's comment that the payment of money was "not denied."

The law in this Circuit regarding prosecutorial comment on a defendant's failure to deny or contradict Government assertions was most recently restated in *United States* v. *Bubar*, Dkt. No. 76-1140, slip op. 4519 (2d Cir. June 30, 1977):

> . . . The prosecutor is entitled to comment on a defendant's failure to call witnesses to contradict the factual character of the government's case, *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (2d Cir.), *cert. denied*, 419 U.S. 873 (1974), as well as his failure to support his own factual theories with witnesses. *United States* v. *Rodriguez*, — F.2d — (2d Cir. 1977), slip op. 3429,

> 3434 (May 11, 1977); *United States* v. *Lipton*, 467 F.2d 1161, 1168 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury "naturally and necessarily" would interpret the summation as a comment on the failure of the accused to testify. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970).

Slip op. at 4531. *See also United States* v. *Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976); *United States* v. *Armedo-Sarmiento*, 545 F.2d 785, 793 (2d Cir. 1976), *cert. denied*, — U.S. — (1977).

Neither of the conditions cited in *Bubar* was present with respect to the Government's evidence that money passed between Amparo and Sanchez. As to the "defendant alone" having the information to contradict this evidence, that clearly was not the case, nor was it the focus of the prosecutor's remark. The second twenty-dollar bill was passed in the sight of a surveilling F.B.I. agent (Horan). It was handed immediately after the meeting to another F.B.I. agent (Lynch). Its passage was confirmed unequivocally by the tape recording of the contemporaneous conversation.

The defense attorney could have contested the passing of the bill through these sources—by calling the agent who observed the passing of the envelope, by questioning the agent who accepted the envelope from Sanchez, by making some effort to explain the references to the money on the tape recording. He did none of these things. Nor did he even attempt, while cross-examining Sanchez herself, to cast doubt on the fact that she had received two twenty-dollar bills. On the contrary, as pointed out above, he as much as conceded the payments, and focused his defense on the question of Amparo's motive and intent. Almost certainly, therefore, the jurors took the

prosecutor's "not denied" remark as comment upon the defense *attorney's* tactics,* and surely they need not "naturally and necessarily" have taken the remark as comment on Amparo's silence. Rather, the statement was simply an accurate recapitulation of the disputed factual issues before the jury.

Finally, any improper suggestion that might have been contained in the prosecutor's remarks was corrected by the judge's instructions, which followed immediately upon the rebuttal summation and contained an emphatic, repeated instruction regarding the defendant's privilege not to testify or produce evidence. (Tr. 831-32).

## B. Reversal is not required by the prosecutor's statement that Amparo could receive probation.

The prosecutor's remark concerning the judge's power to impose a sentence of probation was entirely proper in light of the defense attorney's repeated statements that Amparo's "liberty" was at stake.** Once the defense attorney had raised the question of punishment, it was permissible for the Government to comment on the same subject. In a number of contexts this Court has condoned prosecutorial comment on otherwise improper subjects, once the defense counsel has "opened the door." *See, e.g.,*

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* In rejecting a claim similar to Amparo's, this Court in *United States* v. *Bubar*, *supra*, reasoned that "[t]he thrust of the prosecutor's rebuttal summation was directed at the prior arguments of defense counsel," and therefore was not "naturally and necessarily" understood as comment upon the *defendant's* silence. Slip op. at 5431-32. The same can fairly be said of the rebuttal summation in this case. (Tr. 813, 814, 816, 818, 819, 821, 823, 824).

** Significantly, nowhere in Amparo's brief does he ever defend his own trial lawyer's decision to raise during his summation—on several occasions—the issue of possible sentence.

*United States* v. *Floyd*, 555 F.2d 45, 47 (1977) (comment on defense's failure to exercise subpoena power, following defense attorney's comment on Government's failure to call witnesses); *United States* v. *Taylor*, Dkt. No. 76-1210, slip op. at 2820-21 (2d Cir. April 19, 1977) questioning of witness about Witness Protection Program after defense attorney had brought out that witness was being paid and protected by Government); *United States* v. *Ricco*, 549 F.2d 264, 274 (2d Cir. 1977) (comment on perjury liability of witnesses and on Witness Protection Program after defense attorney had suggested witnesses were in Government's pay); *United States* v. *Stassi*, 544 F.2d 579, 585 (2d Cir. 1976), *cert. denied*, — U.S. — (1977) (forcefulness of prosecutor's summation "exceeded the norm," but in response to defense's suggestion of Government frame-up); *United States* v. *Wolfish*, 525 F.2d 457, 460 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976) (comment on defendant's violation of Ten Commandments following defense attorney's explanation of defendant's activities in religious terms); *United States* v. *Ramirez*, 482 F.2d 807, 816 (2d Cir.), *cert. denied*, 414 U.S. 1070 (1973) (request that jury not be swayed by sympathy following defense attorney's attempts to arouse same).

In the context of this case, the prosecutor was certainly entitled to correct an *erroneous* statement by the defense attorney.* Amparo's "liberty" was *not* neces-

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* This Court has more than once approved otherwise objectionable commentary or evidence where necessary to correct an erroneous factual impression created by the defense. *E.g.*, *United States* v. *Estremera*, 531 F.2d 1103, 1108-10 (2d Cir.), *cert. denied*, 425 U.S. 979 (1976); *United States* v. *Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975), *cert. denied*, 425 U.S. 960 (1976).

sarily "at stake," probation being a possible —and, as it turned out, actual—outcome after conviction.*

Finally, even if there was impropriety in the prosecutor's statement, it is not cause for reversal. The jury was immediately instructed on two occasions, and indeed told by the prosecutor himself, that Amparo's punishment was not its concern. As this Court very recently stated in *United States* v. *Mejias*, 552 F.2d 435, 446 (2d Cir. 1977):

> . . . in the give and take of a lengthy trial it is inevitable that counsel will occasionally step over the line of propriety. Contrary instructions are usually adequate to correct such situations.

Certainly it cannot be said that the mention of the possibility of probation "had the effect of depriving [Amparo] of a fair trial." *Id.* at 446. The prosecutor's statement was therefore harmless error, if it was error at all.

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* As noted above, on May 16, 1977, Judge Stewart suspended imposition of sentence on Amparo and placed him on three years' probation.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the Southern District of New York, Attorney for the United States of America.*

DAVID C. PATTERSON,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,*
*Of Counsel.*

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Form 280 A. - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York )
County of New York )

I Julia M. Smalls being duly sworn deposes and says that ~~he~~ (she) is employed in the office of the United States Attorney for ~~the~~ Southern District of New York.

Stating also that on the 19th day of August, 1977 ~~he~~ (**she**) served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

David J. Gottlieb
Legal Aid Society
Federal Defenders Unit
509 United States Courthouse
Foley Square, New York, New York 10007

And deponent further says that ~~he~~ (she) sealed the said envelope and placed the same in the mailbox for mailing at the United States Attorney's Office, Southern District of New York, One St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of Manhattan, City of New York.

Julia M. Smalls

Sworn to me before this

19th day of August, 1977

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978

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